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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 695

GEORGE WILLIAM HENSON - - Petitioner

Versus

UNITED STATES OF AMERICA - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. ——

GEORGE WILLIAM HENSON - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

George William Henson, defendant in a criminal action prosecuted in the United States District Court, Eastern District of Kentucky at London, and appealed to the United States Court of Appeals for the Sixth Circuit, prays that a Writ of Certiorari issue to review the judgment of the United States District Court for the Eastern District of Kentucky entered in this action and to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 30, 1966.

OPINIONS BELOW

The United States District Court for the Eastern District of Kentucky rendered no opinion. The opinion of the United States Court of Appeals for the Sixth Circuit is not reported at the time of the writing

of this petition. A copy of said opinion appealed from is appended hereto on Pages 19-23. The mandate of the United States Court of Appeals for the Sixth Circuit has not yet issued.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was rendered on the date mentioned above and the mandate has not yet issued.

The petitioner has been granted stay of the mandate pending this petition for Writ of Certiorari to this Court and it is expected that the mandate will issue on October 23, 1966. This petition is, therefore, filed within the thirty (30) days prescribed by Rule 22 of the Rules of the United States Supreme Court.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254 (Sub-section 1).

QUESTIONS PRESENTED

I.

MAY DEFENDANT BE CONVICTED BY THE TESTIMONY OF AN ADMITTED ACCOMPLICE WITHOUT CORROBORATING EVIDENCE.

II.

DID THE TRIAL COURT ERR IN REFUSING TO PERMIT THE PETITIONER TO INTRODUCE LETTERS RECEIVED FROM ONE OF RESPONDENT'S WITNESSES IN RELATING TO THE EVENTS ALLEGED IN THE INDICTMENT.

III.

WHETHER THE TRIAL COURT ERRED IN ITS FAILURE TO PROPERLY INSTRUCT THE JURY BY VIRTUE OF THE RAMBLING AND CONFUSING LANGUAGE AND ITS EVIDENT FAILURE TO PROVIDE SUFFICIENT GUIDELINES DESIGNED TO PRODUCE A COMPETENT VERDICT.

IV.

WHETHER THE TRIAL COURT ERRED IN RESUBMITTING THIS CASE TO THE JURY A SECOND TIME AFTER THE JURY HAD RENDERED THEIR VERDICT.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, OR REGULATIONS INVOLVED

18 U.S.C.

Section 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five (5) years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

June 25, 1948, c. 645, 62 Stat. 701.

Section 742. DEALING IN COUNTERFEIT OBLIGATIONS OR SECURITIES.

"Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligations or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000.00 or imprisoned not more than ten (10) years, or both."

June 25, 1948, c. 645, 62 Stat. 705.

STATEMENT OF THE CASE

The petitioner, George William Henson, along with Charles V. Wheeler and Harold Bruce Staton, was jointly indicted by a Federal Grand Jury in a four-count indictment at the January 1965 Session at Lexington, Kentucky. Count No. 3 was later dismissed as it pertained to this petitioner and Count No. 4 of the indictment made no charge against this petitioner. Counts No. 1 and 2, insofar as they are pertinent to this petition; alleged as follows:

Count 1

"THE GRAND JURY CHARGES:

That from on or about the 23rd day of September 1964 up to and including the fifth day of November 1964, in the Eastern District of Kentucky, the defendants, George William Henson, Charles V. Wheeler, and Harold Bruce Staton, did willfully and knowingly combine, conspire, confederate and agree together and with each other to commit an offense against the United States, that is, to unlawfully and with intent to defraud, possess, pass, utter and sell, and attempt to pass, utter and sell a quantity of falsely made forged and counterfeited obligations of the United States consisting of counterfeit currency in denominations of $10

and $20, in violation of Sections 472 and 473, Title 18, U.S. Code.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about the twenty-third day of September 1964, in the Eastern District of Kentucky, the defendants, George William Henson and Charles V. Wheeler contacted Dave Burton, proprietor of the East 80 Wrecking Company, Somerset, Kentucky, at his place of business and exhibited to him a large quantity of counterfeit $10, $20, and $100 notes. Defendant George William Henson gave Dave Burton two (2) sample counterfeit $10 notes and advised him that if he could secure a buyer for $25,000 in the counterfeit notes for $11,000 he would pay him a commission of $1,000 for his efforts.

2. On or about the fourteenth day of October, 1964, in the Eastern District of Kentucky, defendant George William Henson again contacted Dave Burton to ascertain if he had found a buyer for the counterfeit notes. . . .

Count 2

THE GRAND JURY FURTHER CHARGES:

That on or about the 23rd day of September, 1964, at Somerset, Pulaski County, in the Eastern District of Kentucky,

GEORGE WILLIAM HENSON, and
CHARLES V. WHEELER

with intent to defraud, did possess, and keep in possession a large quantity of counterfeited obligations of the United States, in denominations of $10.00, $20.00 and $100.00 notes. . . . "

The case was transferred to London, Kentucky and the trial was held on June 7 through 11, 1965.

The only evidence connecting this petitioner with the incidents alleged in the indictment is the testimony of Dave Burton, who runs a wrecking yard in Somerset, Kentucky. (T.R. 24-80). Burton testified that this petitioner and one Charles Virgil Wheeler came to his place of business on September 23, 1964, and gave him two (2) $10 counterfeit bills and offered to sell him $25,000 of this counterfeit money for $11,000. Burton was to receive a commission of $1,000 for arranging the sale. Burton admits that he took the money and that he agreed to find a buyer for same. Burton even admits that he did find such a buyer. (T.R. 50-51). Later, Burton "got scared", took the two $10 bills to the Pulaski County Sheriff at Somerset, Kentucky. No other witness testified that petitioner contacted Burton or that in fact petitioner was ever in Somerset, Kentucky. Henson denies having seen Burton and having been in Somerset, Kentucky. (T.R. 425-426). The co-defendant Wheeler also testified that he had never been in Somerset, Kentucky with Henson. (T.R. 476-544).

Petitioner attempted to introduce into evidence two (2) letters postmarked and mailed in Somerset, Kentucky and addressed to him in care of the Gables Motel at Lexington, Kentucky. It had been established that petitioner resided at the Gables Motel. One of these letters was postmarked November 30, 1964, and the other March 29, 1965. Each of these letters was on the bill-head of Mr. Burton's wrecking company in Somerset, Kentucky, with Burton's name

appearing thereon; they were each postmarked in Somerset, Kentucky, and contained information relating to the events alleged in the indictment. Nevertheless, the Court refused to permit petitioner to introduce these letters into evidence on his behalf.

The Court gave the jury long and complicated instructions which required 27 pages of the record in the transcription. (T.R. 691-719). The jury, after less than two (2) hours of deliberation, returned a verdict which indicates the confusion among the members of the jury. The initial verdict convicted the petitioner only of Overt Act 1, under Count 1 of the indictment. (T.R. 719-720). The Court attempted to clarify the instructions and the jury again retired to return minutes later with a verdict convicting the petitioner under Counts 1 and 2 of the indictment. (T.R. 725).

REASONS FOR GRANTING THE WRIT

1. DEFENDANT SHOULD NOT BE CONVICTED BY THE TESTIMONY OF AN ADMITTED ACCOMPLICE WITHOUT CORROBORATING EVIDENCE.

This Court has long recognized the necessity for corroborating the testimony of an accomplice by independent evidence. In *Dunbar* vs. *United States,* 156 U. S. 185, this Court stated at page 200 that "as to certain counts, there could be no conviction because as to them the testimony was only that of an accomplice and uncorroborated." While this Court refused in *Holgram* vs. *United States,* 217 U. S. 509, to reverse the judgment of the lower Court for failure to give a prepared instruction for the necessity for corroboration of the testimony of an accomplice because the in-

struction assumed the witness was an accomplice, a conclusion that was controverted, it did say at page 524 that:

> It is undoubtedly the better practice for Courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony giving credence to them.

This Court approved the ruling of the lower Court in *Bihn* vs. *United States,* 328 U. S. 633 that statements made out of court, while admissible against the declarant, are not admissible to implicate an alleged co-conspirator.

The lower Federal Courts have recognized this mandate and have required corroborating evidence for testimony of an accomplice. In the Fifth Circuit, the Court said in *Rogers* vs. *United States,* 334 F. 2d 83 at page 86, that "Statements by one conspirator are permitted to be received against another if made during pendence of the conspiracy and if there is independent evidence of the existence of the conspiracy and of the objecting party's participation in it."

The Third Circuit expressed its view in *United States* vs. *Rossello,* 216 F. 2d 877 at page 880 when it held that:

> . . . Declarations of a co-conspirator are not admissible to establish that another defendant has become a member of the conspiracy, such declarations are admissible to establish the nature of the confederation which the direct evidence has shown that a defendant has joined.

The Appellant, Henson, contends (1) that his conviction was based solely on the testimony of an accomplice which was uncorroborated by any direct

or independent evidence and (2) that the Trial Court misled the jury by its instruction on this point.

The first witness for the United States was David Burton. The Appellant, Henson, contends that Burton was an accomplice at the time of the alleged connection with Appellant, Henson, and that his testimony incriminating the Appellant, Henson, concerned the period before Burton "got scared" (T.R. 52) and went to the Sheriff. This is demonstrated by the testimony of Burton on cross-examination (T.R. 50-51):

Q. 3. Do you figure that George (Henson) thought you would help him handle some hot money?

A. Yeah, that's what I figured.

Q. 4. And you were inclined to do so, weren't you?

A. At the present time I was.

Q. 5. And when you claim that these first two $10 bills were left with you, you really intended to help pass this counterfeit money, didn't you, knowing that it was counterfeit money?

A. That's right.

Q. 6. And on up to the third time they came over there you were still going along on this deal of trying to find a market for this money, weren't you?

A. Yeah, I found a market, all right.

Q. 7. You had actually gone out and found a market for the counterfeit money, hadn't you?

A. Yes, I had.

Q. 8. And you were expecting to get some profit out of it, weren't you?

A. That's right, at the time I was.

It is clear by Burton's testimony that he was involved in the conspiracy and was a co-conspirator and an accomplice. Since Burton was the first witness for the Appellee, United States, it would have been impossible for any independent or direct evidence to have established the conspiracy before his testimony. It was his testimony and his testimony alone that was used to establish the conspiracy insofar as this Appellant is concerned. Yet Burton by his own testimony, *supra,* admits he was a voluntary member. Appellant, Henson, waited to see if this testimony would be corroborated and when at the end of Appellee's evidence it had not been, he moved for a directed verdict of acquittal on the conspiracy count on the grounds that there was no *competent* evidence to show that he had entered into any conspiracy (T.R. 376) and a directed verdict of acquittal on the "possession with intent to defraud" count on essentially the same grounds (T.R. 378) (emphasis ours). The motions were denied (T.R. 391).

When the Trial Court was receiving instructions, the Appellant, Henson, again requested a directed verdict of acquittal on both Counts 1 and 2 of the indictment. The motion was again overruled (T.R. 671).

Appellant, Henson, contends that the Trial Court should have granted his motions for directed verdicts of the indictment because there was no competent evidence to support the Counts, i.e., the sole evidence was the uncorroborated testimony of the accomplice and co-conspirator, Dave Burton.

Even if this Court finds that the Trial Court correctly denied the motions for directed verdicts of acquittal and correctly sent the case to the jury, the petitioner, Henson, contends that he was prejudiced by an erroneous instruction to the jury. The Trial Court gave the following instruction (T.R. 206):

"An accomplice is one who voluntarily participates in the commission or the planning of a crime. If the jury believes that the witness, Dave Burton, directly participated as an accomplice in the commission of the offense charged, his testimony should be closely examined and weighed with great care. *If the jury believes the testimony of an accomplice to be true beyond a reasonable doubt, that testimony is sufficient to convict the defendant, even though it is not corroborated by any other evidence.*" (Emphasis ours). In *Weiler* vs. *United States,* 323 U. S. 606, this Court held at page 611:

> We cannot say that it did not (prejudice). The jury convicted without being instructed that more than the testimony of a single witness was required to justify their verdict. This was no mere 'technical' error relating to 'formalities and minutiae' of the trial.

A fortiori a person is prejudiced even more if the jury is instructed that corroboration is *not* necessary. The *Weiler* case, *supra,* involved the special situation of perjury and the "two witnesses or one witness and corroboration" rules. However, it is analogous to the need for corroboration of the testimony of an accomplice.

The petitioner, Henson, urges that the Trial Court erred in instructing the jury that independent evidence was not needed to corroborate the testimony of an

accomplice, a rule controverted by this Court for many years. Such error was prejudicial and Appellant's conviction should be set aside.

2. THE COURT ERRED IN REFUSING TO PERMIT THIS PETITIONER, GEORGE WILLIAM HENSON, TO INTRODUCE LETTERS RECEIVED FROM ONE OF RESPONDENT'S WITNESSES AND RELATING TO THE EVENTS ALLEGED IN THE INDICTMENT.

The petitioner, Henson, was in possession of two letters written to him and postmarked as having been mailed from Somerset, Kentucky. When the petitioner attempted to introduce these letters into evidence the Court refused to allow their admission based on the Government's objection to their authenticity (T.R. 417). Both letters were placed into the record by way of avowal and appear on Pages 423, 424 and 425 of the record.

The authorities generally concede that under proper facts and circumstances the authenticity or genuineness of a letter may be established by indirect or circumstantial evidence. *Dunbar* vs. *United States,* 156 U. S. 185.

The petitioner, Henson, testified (T.R. 410) that Burton wrote him a letter which was postmarked November 30, 1964 and was mailed at Somerset, Kentucky. The letter reads: (T.R. 423)

> "Dear Sir:
>
> If you want to stay out of that trouble down there in Somerset, send me $1,000.00. I will tell them that I don't know you at all. Say you do this by the 10th of this month, for I have got to go to Louisville on this business."

The second letter received by the petitioner, Henson, was delivered some time in March, 1965. It reads: (T.R. 424, 425)

"Dear Sir:

I am not mad at you at all. Time is running out for you. When I wrote you before I only needed $1000.00. Now I need $2000.00. Send it to me by a friend or bring it yourself. I will be at the wrecking yard most any time.

(Signed) D.B."

Both letters referred to were written on the billheads of the East 80 Wrecking Company, owned and operated by Dave Burton in Somerset, Kentucky, where the letters were postmarked.

The first letter came December 2, 1964, some six (6) weeks after Burton had asked Henson to help him get some counterfeit money. (T.R. 409). The second letter arrived some three (3) months later in March, 1965.

The letters contained such information that Dave Burton would be most likely to know. It was shown by the petitioner that he knew no one in Somerset except Dave Burton.

The second letter was signed by the initials "D.B.". It referred to "the wrecking yard" as the pay-off point. Who else but Burton would have been writing to the petitioner demanding money to keep quiet? The entire record shows no other person in Somerset who would have been interested in writing the petitioner demanding money except Burton.

The circumstances set out are enough to require the letters to be admitted into evidence and allowed

the jury to attribute such weight to them as they were entitled.

To refuse admission of the letters was error.

3. THE TRIAL COURT ERRED IN ITS FAILURE TO PROPERLY INSTRUCT THE JURY BY VIRTUE OF THE RAMBLING AND CONFUSING LANGUAGE AND ITS EVIDENT FAILURE TO PROVIDE SUFFICIENT GUIDELINES DESIGNED TO PRODUCE A COMPETENT VERDICT.

Petitioner acknowledges the fact that timely objection was not made to the giving of instructions, but contends that the very nature of the complaint against these instructions occasioned the failure to object. The misleading, confusing monologue which was offered to the jury for some considerable time by the Court, was equally as confusing and misleading to counsel and the character of the entire charge did not become apparent until an equally confusing verdict was erroneously returned by the panel.

It is well established that under Rule 52(b) of the Federal Rules of Criminal Procedure and the great weight of cases that, "An Appellate Court may take notice on its own motion of prejudicial error inherent in a Trial Court's instructions to a jury." *Morissetti* vs. *United States of America*, 342 U.S. 246. *Smith* vs. *United States of America*, 230 F. 2d 935. *Lazarov* vs. *United States of America*, 225 F. 2d 1329.

There is no intention on the part of this petitioner to unwarrantedly criticize the ability or sincerity of the Trial Judge in his preparation and presentation of the instructions. Petitioner realizes the involvement and morass of evidence made available to the jury at this trial and even further complicated by the

physical facts presented at the actual trial of three defendants at one time. However, the fact does remain that the jury evidenced confusion from the instructions when they returned a verdict inconsistent with those instructions.

It is the contention of the petitioner that the length and complexity of the instructions, coupled with the failure of the Court to properly instruct concerning accomplices and co-conspirators, constitutes an unclear and ambiguous charge and, taken as a whole inadequate to protect the rights of this petitioner. It is the further contention that these erroneous instructions constitute substantial prejudicial effect upon this petitioner and in its confusion, allowed the jury to return a verdict inconsistently formulated.

4. THE COURT ERRED IN RESUBMITTING THIS CASE TO THE JURY THE SECOND TIME AFTER THE JURY HAD RENDERED A VERDICT.

The case was submitted to the jury on June 11th at 9:40 A. M. The jury returned at 11:20 A. M. and handed their verdict to the Clerk and announced to the Court they had reached a verdict. The Court read the verdict in open court, as follows: (T.R. 719-720)

> "We, the jury, find George William Henson guilty Overt Act No. 1, Charles V. Wheeler guilty Overt Acts Nos. 1, 4, and 5, Harold Bruce Staton guilty Overt Act No. 4.
>
> (s) J. S. Helton
> Foreman."

Following this verdict, the Court, on his own motion, stated: (T.R. 720)

> "Gentlemen, as you can see, the finding is that the defendants are found guilty — George William

Henson found guilty on Overt Act 1; Charles V. Wheeler found guilty on Overt Acts 1, 4 and 5; Harold Bruce Staton guilty on Overt Act 4. Of course the question for the jury is as to the guilt or innocence of the defendants as to each of these counts, rather than the overt acts."

The Court then resubmitted the case to the jury and the jury returned shortly with another verdict which read: (T.R. 725)

"We, the jury, find George William Henson guilty in Count No. 1 and 2; Charles V. Wheeler guilty in Counts No. 1, 2, 3 and 4; Harold Bruce Staton guilty in Count No. 1 and 4."

The variance between the first verdict which charged the defendant, Henson, guilty under Overt Act 1 to guilty under Counts 1 and 2 is more than just a simple correction of a mistake on the part of the jury. It resulted in a conviction under a different Count than that which the jury must have intended when, in their first verdict, they found Henson guilty of Overt Act 1.

It is the contention of the petitioner Henson that the jury found him guilty of Overt Act 1 which is the same as Count 2. The sentence imposed under Count 2 was ten (10) years imprisonment. This, at the most, is all that defendant Henson should have received.

The second verdict added to this sentence five (5) years under Count 1 which was not a part of Overt Act 1, which was the original verdict of the jury.

While the law is clear that the Court may correct or have the jury correct any inadvertent mistake before accepting the verdict it is equally clear that, in this case, this action went much further than to correct a mere mistake. It added a conviction under a differ-

ent count and for this reason it was erroneous to receive this verdict of guilty under Count 1 against the defendant, George William Henson.

CONCLUSIONS

We respectfully submit that the evidence introduced by the government was insufficient to sustain a conviction of the petitioner. Even assuming that the evidence was sufficient, the petitioner is entitled to proper instruction setting out the proper consideration which the jury should give to the testimony of an accomplice or co-conspirator.

The petitioner was further denied when he was not permitted to introduce competent evidence by the use of letters from respondent's witness and relating to the incident alleged in the indictment.

We further urge that the instructions must be so drawn that the jury *may* reach the right conclusion. Such was not the case below and the jury demonstrated their confusion the first verdict they returned. Even after the jury demonstrated their confusion the Court erroneously resubmitted the case to them.

We respectfully submit that this Court grant a review of petitioner's case.

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APPENDIX

FILED
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Nos. 16812-13-14

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GEORGE WILLIAM HENSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CHARLES V. WHEELER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HAROLD BRUCE STATON,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided August 30, 1966

Before: Weick, Chief Judge, Celebrezze, Circuit Judge, and Cecil, Senior Circuit Judge.

PER CURIAM. Defendants-Appellants, George William Henson, Charles V. Wheeler, and Harold Bruce Staton, were jointly indicted and convicted of

conspiracy to sell counterfeit currency in violation of Title 18 U.S.C., Sections 472 and 473.

The evidence disclosed the following pertinent facts: On September 23, 1964, George Henson and Charles Wheeler asked one Dave Burton if he could find a buyer for $25,000 of counterfeit ten and twenty dollar bills. Two counterfeit ten dollar bills were left with Burton as samples. Burton then disclosed the plan to the police.

Henson and Wheeler also contacted one Doyle Couch in an attempt to sell counterfeit money to him. Couch was not interested and after Wheeler and Henson left he called the police giving them a description of the two men and the car they were travelling in. The police found the automobile being driven by Henson, with Wheeler riding as a passenger. The police chased the Henson automobile for two miles before it was finally stopped. No counterfeit currency was found in the automobile, but a truck driver picked up counterfeit bills scattered along the highway.

On November 5, 1964, a meeting was arranged with Burton and a buyer for the counterfeit money. Burton and a special agent met Wheeler and Staton at a motel. When the counterfeit money was delivered to the special agent, police officers arrested Wheeler and Staton.

Several grounds for reversal are urged by the Appellants. First it is argued that the trial court erred in sustaining the judgment of conviction upon an indictment which charged one conspiracy where the proof showed two conspiracies. In *Kotteakos* v. *United States,* 328 U. S. 750 (1946), the variance of proving several conspiracies was held to be prejudicial. The Court stressed the crucial fact that thirty-two persons were named in the indictment and nineteen

were brought to trial. The only common factor was the defendant Brown who acted as broker for the other defendants. Most of the defendants did not have any relationship or connection with any of the other defendants. Here the defendants were acting together in a common scheme. Only three defendants were indicted. See *Berger* v. *United States,* 295 U. S. 78 (1935). No surprise was claimed, and we see no prejudicial error resulting to the defendants.

Error is claimed in the testimony of Trooper Walton who testified that Defendant Wheeler admitted he threw money out of the car during the time he was being chased by Walton. No objection was raised at the time this evidence was introduced. Later, however, the statement was objected to, and the Court instructed the jury to disregard the testimony, stating:

> "Members of the jury, shortly before the recess of the court on yesterday the witness for the United States, Freddie Walton, a trooper with the Kentucky State Police, testified with reference to a statement made by the defendant, Charles V. Wheeler, said statement having been made on October 8, 1964, relative to certain counterfeit currency. Motion was made to exclude this testimony from the consideration of the jury. The Court heard the evidence in regard to that matter out of the presence and hearing of the jury and, having heard the evidence, the Court sustained the motion. The jury is admonished not to consider for any purpose the statement made by Trooper Freddie Walton of the Kentucky State Police with reference to a statement made by the defendant, Charles Wheeler, on October 8, 1964 relative to this alleged counterfeit currency. Do not consider that for any purpose."

We find that the Court's admonition to the jury was sufficient to protect the defendant's rights and no prejudicial error resulted.

The jury returned a verdict finding the defendants guilty of certain overt acts charged in the indictment. The Court, after instructions, re-submitted the case to the jury to place their verdicts in the proper form. No objection was raised by the defendants and we find this procedure was proper.

The Court has the power, before accepting a verdict and discharging the jury to permit the jury to correct a mistake in the verdict. *Helms* v. *United States,* 310 F. 2d 236 (C.A. 5, 1962); *Wilder* v. *United States,* 246 F. 2d 186 (C.A. 5, 1957); *Firemen's Insurance Company of Newark, New Jersey* v. *Graigie,* 298 F. 2d 457 (C.A. 8, 1962).

We have examined the other claimed errors raised by the Appellants and find them to be without merit. The judgments of the District Court are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16,812

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GEORGE WILLIAM HENSON,
Defendant-Appellant.

FILED
AUG 30, 1966
CARL W. REUSS, CLERK

BEFORE: WEICK, Chief Judge, CELEBREZZE, Circuit Judge and CECIL, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

(s) CARL W. REUSS
Clerk

UNITED STATES CIRCUIT COURT OF APPEALS

For The Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

GEORGE WILLIAM HENSON and
CHARLES V. WHEELER,
Defendants-Appellants.

FILED
SEP 23 1966
CARL W. REUSS, Clerk

BEFORE: WEICK, Chief Judge, CELEBREZZE, Circuit Judge, and CECIL, Senior Circuit Judge.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by order of the Court.

(s) CARL W. REUSS
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 695

GEORGE WILLIAM HENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of Kentucky of possessing counterfeit money and conspiracy to pass such money. On June 11, 1965, he was sentenced to imprisonment for ten years on the substantive count, with a concurrent five year sentence on the conspiracy count.

The judgment of the court of appeals was entered on August 30, 1966. The petition for a writ of cer-

tiorari, filed October 18, 1966, is out of time under Rule 22-2 of the Rules of this Court notwithstanding the stay of mandate by the court of appeals. *Boylan* v. *United States*, 257 U.S. 614. There is, in any event, no occasion for further review.

The evidence showed that on September 23, 1964, petitioner and co-defendant Wheeler approached David Burton at his automobile wrecking yard in Somerset, Kentucky, and offered to sell $25,000 in counterfeit notes for $11,000 (Tr. 24-30).[1] When Burton agreed to try to find a buyer (Tr. 30) he was given two counterfeit $10 notes to use as samples (Govt. Exh. 1, Tr. 29-30). On September 26, 1964, Burton revealed the scheme and showed the sample notes to the county sheriff (Tr. 33-34). Subsequently petitioner and Wheeler advised Burton that they would be willing to sell $10,000 in counterfeit notes for $4,800, and urged him to find a buyer for that amount (Tr. 34-35). Burton arranged for secret service agent Motto to negotiate a purchase of counterfeit money at a motel near Burton's place of business (Tr. 40, 90, 112). On November 5, 1964, co-defendants Staton and Wheeler drove to the motel. Staton remained in the car, while Wheeler entered Motto's motel room and negotiated with the agent (Tr. 117). When satisfactory terms were reached, Wheeler went back to the car where he spoke to Staton, who then drove off (Tr. 118, 166). Staton returned in ten minutes, and carried to the motel room a package

[1] "Tr." refers to the trial transcript, which has been filed with the Court.

concealed under a coat (Tr. 119). Both Wheeler and Staton were then arrested by other secret service agents who had maintained a surveillance throughout the proceedings (Tr. 123, 167, 208, 223-225, 242). The package contained $19,990 in counterfeit bills, which were identical in design, defects, and serial number to Burton's sample $10 notes (Tr. 169-181).

Prior to the transaction with Motto, on October 7, 1964, petitioner and Wheeler had tried to sell counterfeit notes to one Doyle Couch in Bear Branch, Kentucky (Tr. 267-272). After petitioner and Wheeler drove off, Couch notified the state police (Tr. 274). A state trooper, a few minutes after hearing a dispatch describing petitioner's automobile and the attire of both the driver and passenger, saw the car and pursued it. Petitioner, who was driving, increased his speed, but was apprehended after a four or five mile chase (Tr. 290). No counterfeit money was found in the car or on the persons of either occupant, and the trooper did not see Wheeler throw anything out of the window during the chase (Tr. 297, 299). However, that same day, a truck driver found several bundles of counterfeit $10 and $20 bills on the shoulder of the highway (Tr. 355; Govt. Exhs. 13-16). Some of the $10 notes bore the same serial number as the samples which petitioner had given to Burton. An expert concluded that the money found by the truck driver and Burton's sample notes came from the same source (Tr. 368).

1. Petitioner challenges the rule in the federal courts that testimony of an accomplice is sufficient to support a conviction even if it is not corroborated.

This rule is firmly established, and has withstood countless applications for change. *Holmgren* v. *United States*, 217 U.S. 509; *Caminetti* v. *United States*, 242 U.S. 470, 495; *Krulewitch* v. *United States*, 336 U.S. 440, 454; *United States* v. *Kelly*, 349 F.2d 720, 767 (C.A. 2). The district court advised the jury that if they believed that Burton was an accomplice, "his testimony should be closely examined and weighed with great care." (Tr. 706). Petitioner was entitled to no more than this clearly presented instruction.

2. Petitioner testified on his own behalf that he had never travelled with Wheeler to Burton's wrecking yard, that he did not propose a deal to Burton regarding the sale of counterfeit money, and that he never possessed counterfeit notes (Tr. 425-426). Petitioner claimed that Burton came to his motel room and asked whether petitioner knew where to obtain some counterfeit notes (Tr. 408). Petitioner asserted that he angrily told Burton to leave the room (Tr. 409). In support of his story, petitioner attempted to introduce in evidence two letters mailed to him from Somerset, Kentucky. One envelope was postmarked November 30, 1964; the other, March 1965. The first letter was unsigned, and the other bore the initials "D.B." Both had been written on Burton's business stationery. The letters requested petitioner to send the author money, in exchange for which the author would promise to tell the police authorities that he did not know the petitioner (Pet. 12-13). The trial judge properly refused to admit the letters into evidence without proof that Burton wrote them (Tr. 412). The letters did not qualify as official records

or documents made in the regular course of business. Accordingly, absent proof of the genuiness of the letters or their authorship,[2] they were inadmissible. *Coppedge* v. *United States*, 311 F.2d 128 (C.A.D.C.), certiorari denied, 373 U.S. 946; *Wolcher* v. *United States*, 200 F.2d 493 (C.A. 9); 2 Wharton's *Criminal Evidence*, § 577 (12th ed. 1955).

3. There is no merit to petitioner's contentions regarding the court's handling of the jury. The closing intructions were not confusing, as petitioner claims. Rather, the trial judge clearly spelled out the elements of each offense and the issues which the jury had to decide (Tr. 691-715). At the close of his instructions, the court asked all counsel whether they had any objections or exceptions. Petitioner's sole objection involved an instruction regarding one of the overt acts on the conspiracy count, and the court withdrew that overt act from the jury's consideration (Tr. 716-718).

After the jury had deliberated for almost two hours, it returned this verdict (Tr. 719-720):

> We the jury, find George William Henson guilty Overt Act No. 1, Charles V. Wheeler guilty Overt Act No. 1, 4 and 5, Harold Bruce Staton guilty Overt Act No. 4.
>
> Signed J. S. Helton
> Foreman

The trial judge discussed with counsel the obviously improper form of the verdict, and indicated that he

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[2] On cross-examination, Burton denied having anything to do with the letters, and stated that he was totally illiterate (Tr. 53-56).

would attempt to clarify the situation by issuing further instructions and sending the jury back to deliberate (Tr. 721). None of the defendants raised any objection to the procedure (Tr. 721). After rendering his clarifying instructions, the court again asked whether counsel had any objections or exceptions (Tr. 723):

> MR. NOBLE: The Government has no objections.
>
> JUDGE LEWIS: The defendant Henson has none.
>
> THE COURT: All right, what about the defendant Wheeler?
>
> MR. VIMONT: We have no objection, your Honor.
>
> THE COURT: All right, what about the defendant Staton?
>
> MR. LUNDY: We have none.

The jury deliberated for a half-hour, and returned this verdict (Tr. 725):

> We the jury find George William Henson guilty in Count No. 1 and No. 2; Charles V. Wheeler guilty in Counts No. 1, 2, 3 and 4; Harold Bruch Staton guilty in Count No. 1 and 4.

The court received the verdict without objection from counsel (Tr. 726). The court's procedure in requesting the jury to correct the form of its initial verdict was clearly proper. *Helms* v. *United States*, 310 F.2d 236 (C.A. 5); *Wilder* v. *United States*, 246 F.2d 186 (C.A. 5); see *Bernhardt* v. *United States*, 169 F.2d 983 (C.A. 6), certiorari denied, 335 U.S. 903; *Shiflett* v. *Welch*, 161 F.2d 933 (C.A. 4), certiorari denied, 332 U.S. 777.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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